



FILE COPY

FILED

APR 28 1947

CHARLES ELMORE GOSPELY
CLERK

Supreme Court of the United States

(OCTOBER TERM, 1946)

No. 1063

O. H. FISCHER and MARTHA FISCHER, husband and wife,
Petitioners,

V E R S U S

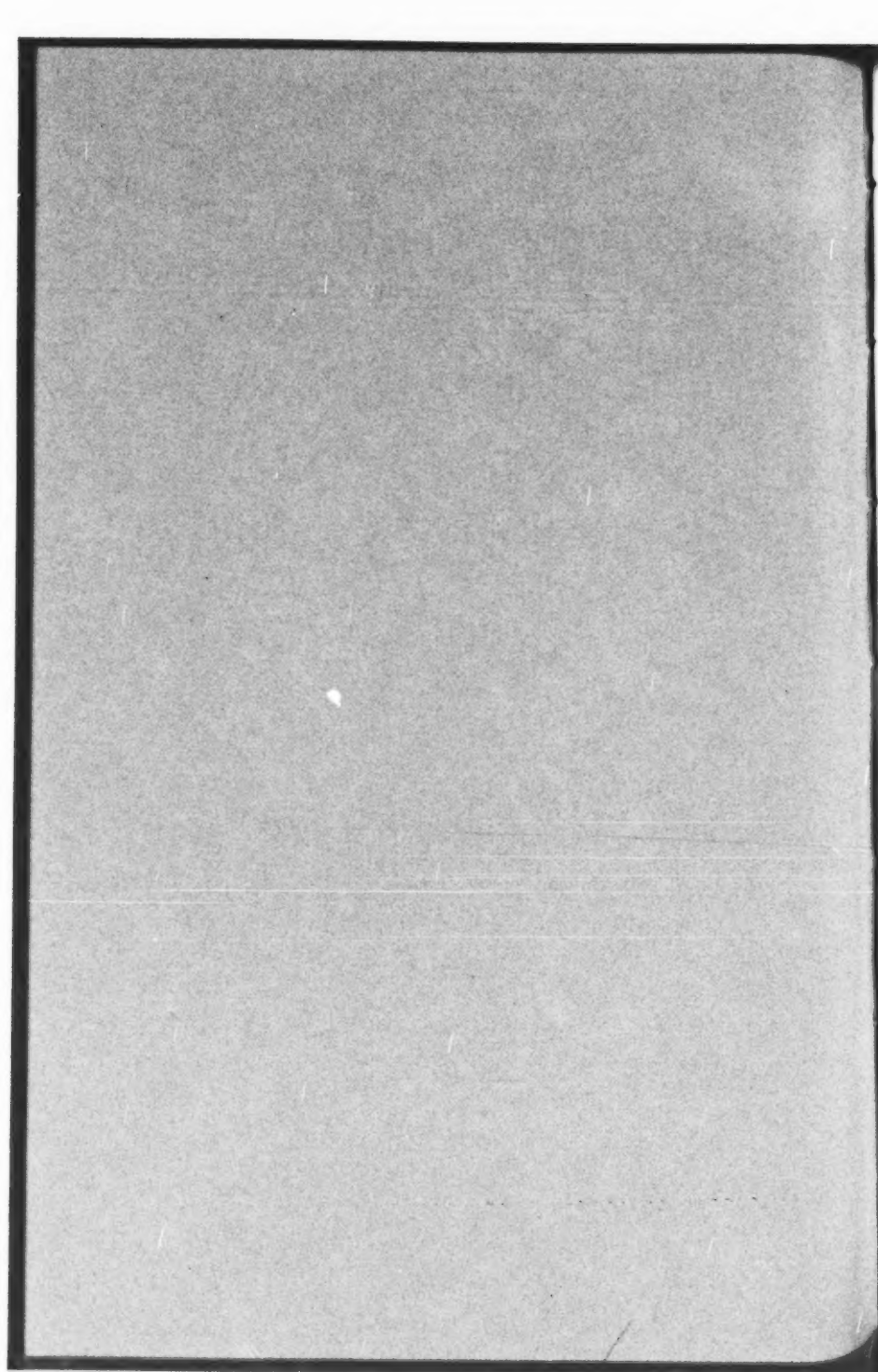
THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

✓ A. L. JEFFREY,
309 Municipal Building,
Oklahoma City, Oklahoma,
Counsel for Respondent.

ARTHUR LEACH,
309 Municipal Building,
Oklahoma City, Oklahoma,
of Counsel.

April, 1947.



INDEX

	PAGE
Grounds of Objection to Jurisdiction	1
Supplemental Statement of Case	2
Argument and Authorities	5
Proposition No. I. No Federal question such as will justify the Supreme Court's assuming jurisdiction is involved in this case	1, 5
Proposition No. II. No Federal question was pre- sented to the State Court as required by the ap- plicable statutes, rules and decisions	2, 8
Proposition No. III. The suit, as to legal questions, involved only construction of certain provisions of the Oklahoma Constitution and Oklahoma Statutes and Federal courts are bound by the construction of local statutory and constitutional provisions placed thereon by the State Court of last resort..	2, 10
Petitioners' Assignments of Error	2, 13
Conclusion	15

CASES CITED:

American Ry. Express Co. v. Commonwealth of Kentucky, 273 U. S. 269, 71 L. Ed. 639	12
Arizona Employers' Liability Cases, 250 U. S. 400, 63 L. Ed. 1058	12-13
City of Wichita v. Klapp, 125 Kan. 100, 263 Pac. 12	7
Consolidated Turnpike Co. v. Norfolk & O. V. Rail- way Co., 228 U. S. 596, 57 L. Ed. 982	6
Dysart v. City of St. Louis, 321 Mo. 514, 11 S. W. (2d) 1045	7

INDEX CONTINUED

	PAGE
Erickson v. King (Minn.), 15 N. W. (2d) 201	8
Erie R. Co. v. Thompkins, 304 U. S. 64, 82 L. Ed. 1188	12
Georgia R. Co. etc. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065	13
Goswick v. City of Durham, 211 N. C. 687, 191 S. E. 728	8
Heese v. Rath, 249 N. Y. 436, 164 N. E. 342	7
Hulbert v. Chicago, 202 U. S. 275, 50 L. Ed. 1026 . .	9
Herndon v. State of Georgia, 29 U. S. 441, 55 Sup. Ct. 794	10
Horn v. State, 184 Okla. 306, 87 Pac. (2d) 127 . . .	12
Iowa v. Rood, 187 U. S. 87, 47 L. Ed. 86	6
Jones v. Oklahoma City, 192 Okla. 470, 137 Pac. (2d) 233	12
Kaukauna Water-Power Co. et al. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. Ed. 1004 . .	7
Kenton County, Fiscal Court v. Richards, 291 Ky. 132, 163 S. W. (2d) 302	8
Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 2 L. R. A. 289	11
Krenwinkle v. City of Los Angeles, 4 Cal. (2d) 611, 51 Pac. (2d) 1098	8
Louisville etc. R. Co. v. Woodford, 234 U. S. 46, 58 L. Ed. 1202	9
McClintock v. City of Rosebury, 127 Ore. 698, 273 Pac. 331	7
North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591	9
Pierce v. Storms, 191 Okla. 410, 130 Pac. (2d) 523	8
Puget Sound Power etc. Co. v. King County, 264 U. S. 22, 68 L. Ed. 541	9

INDEX CONTINUED

	PAGE
Ramsey v. Leeper et al., 166 Okla. 43, 31 Pac. (2d) 852	12
Ruth v. Oklahoma City, 143 Okla. 62, 287 Pac. 406. .8, 14	
Schmoldt v. City of Oklahoma City, 144 Okla. 258, 291 Pac. 119	14
State ex rel. City of Lincoln v. Johnson, 117 Neb. 301, 220 N. W. 273	8
State ex rel. Hile v. City of Cleveland, 26 Ohio App. 265, 160 N. E. 241	8
State v. Monroe County, 148 Fla. 111, 3 So. (2d) 754	8
Southwestern Bell Telephone Co. v. State of Okla- homa, 303 U. S. 206, 82 L. Ed. 751	9, 10
Smith v. Jennings, 206 U. S. 276, 51 L. Ed. 1061 ..	13
Supreme Lodge etc. v. Mayer, 265 U. S. 30, 63 L. Ed. 885	13
Swoger v. Glenn County, 179 Ga. 768, 177 S. E. 723	8
Travis v. Dickey, 96 Okla. 256, 222 Pac. 527	11
United States v. 2.4 Acres of Land Etc., 138 Fed. (2d) 295	6-7
Wentz v. City of Philadelphia, 301 Pac. 261, 151 Atl. 883	7-8

STATUTES CITED:

Title 11, O. S. 1941, Sec. 563	12
Title 13, O. S. 1941, Sec. 344	11
Title 27, U. S. C. A., Sec. 344	5



In the
Supreme Court of the United States

OCTOBER TERM 1946

No. 1063

O. H. FISCHER and MARTHA FISCHER, husband and wife,
Petitioners,

V E R S U S

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

**RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF OKLAHOMA**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Respondent respectfully asserts that the opinion of the Supreme Court of Oklahoma in this cause arrives at the correct conclusion and that this Honorable Court is without jurisdiction to review said case by writ of certiorari for the reasons hereinafter stated.

**GROUND OF OBJECTION TO
JURISDICTION**

Proposition No. I.

No federal question such as will justify the Supreme Court's assuming jurisdiction is involved in this case.

Proposition No. II.

No federal question was presented to the State Court as required by the applicable statutes, rules and decisions.

Proposition No. III.

The suit, as to legal questions, involves only construction of provisions of the Constitution of Oklahoma and Oklahoma Statutes, and Federal Courts are bound by the construction placed on local laws by the State Court of last resort.

Petitioners' Assignments of Error.

SUPPLEMENTAL STATEMENT OF CASE

Counsel for respondent feel that a clearer and fuller statement of the case should be made. On January 16, 1941, the City Council of Oklahoma City adopted a resolution declaring it necessary to acquire fee simple title to petitioners' land and other land " * * * for public parks, with the privilege of locating thereon an aviation airport, * * * " (Shown T.R. 152-153). This resolution directed the City Manager to immediately negotiate with the owners of the land with the view of purchasing the same; and further provided that if the City Manager was unable to procure the fee simple title by purchase, the Municipal Counselor was directed to institute condemnation proceedings under the power of eminent domain to acquire said property for the purposes stated. In February, 1941, the City, having been unable to acquire the land by purchase, instituted in the District Court of Oklahoma County, Oklahoma, a suit in condemnation to acquire the land (See Petition, T.R. 188-

194). Notice of the appointment of commissioners to appraise the land was given (T.R. 179), commissioners were appointed and they appraised the land herein involved at \$28,426.00, which covered, "the value of the full fee simple title of said land * * * " (T.R. 197-199). Thereafter petitioners demanded a jury trial as authorized by the statutes. A jury trial was had on March 18, 1942, at which time the jury fixed the value of petitioners' land at \$28,000.00, and the court rendered judgment in favor of the City and against the Fischers for \$426.00, they having drawn down from the court registry the entire amount deposited by the City in keeping with the commissioners' award. (See Journal Entry of Judgment, T.R. 201-205).

At the top of page 202, Transcript of Record, the Court's judgment recites a stipulation between the parties " * * * that the jury selected should determine: The value of the fee simple title to Tract No. 1 described as follows:" (here—description of petitioners' land). At page 205, Transcript of Record, the court's judgment recited that the full fee simple title and possession of the City in and to the land was forever settled and quieted, and the court then enjoined the Fischers and all others from commencing any suit to disturb the City's possession and title to the land. The Fischers paid the City's judgment in the sum of \$426.00 (T.R. 143). The judgment in the condemnation proceeding became final, and nothing further was heard from the Fischers until early in 1945. The principal reason for the acquisition of petitioners' lands to the extent of constructing an airport was that the main Municipal Airport had been surrendered to the army, and the army excluded all types of flying ex-

cept two major airlines (See Testimony, F. G. Baker, T.R. 86-87). The Civil Aeronautics Administration then made available funds to assist the City in acquiring another airport to accommodate the general public. Immediately after the City had deposited the amount of the commissioners' award in the court registry in February, 1941, the City, with its own funds and funds contributed by the Civil Aeronautics Administration, proceeded to improve the new airport. Within a very short period improvements, principally in runways, had been made from Federal and City funds amounting to several hundred thousand dollars (Testimony, F. G. Baker, T.R. 91-92).

Early in 1945, oil production began to approach Municipal Airport No. 2, and the City advertised for bids for an oil lease. A substantial offer of bonus was made by the Phillips Petroleum Company and a lease was entered into subject to restrictions as to the location of wells so there would be no interference in the operation of the airport (See Contract and Drawing, T.R. 144-149). During these negotiations to lease the premises for oil, the Fischers, for the first time, made any claim to any title in the land, and filed their suit March 15, 1945 (T.R. 4).

The cause was tried in the State trial court June 18th and concluded June 21, 1945, and judgment was rendered in favor of the City (T.R. 208). An appeal was perfected by petition in error to the Supreme Court of the State and a decision in favor of the City was made September 24, 1946 (T.R. 217). The Fischers' petition for rehearing was overruled November 26, 1946 (T.R. 227), and request for

leave to file second petition for rehearing was denied December 19, 1946 (T.R. 240).

ARGUMENT AND AUTHORITIES

Proposition No. 1

No Federal question such as will justify the Supreme Court's assuming jurisdiction is involved in this case.

As we understand petitioners' contention, it is not that any local statute is repugnant to the provision of the Federal Constitution or laws of the United States; but rather that they claim title right, privilege or immunity under the Constitution so as to bring them within Subsection (b), Section 344, Title 28, U. S. C. A. A careful examination of the issues in this case from the beginning fails to disclose anything, which, in our opinion, constitutes such a Federal question as would justify a review in the Supreme Court of the United States. The claim of rights on the part of petitioners has hinged on the construction of certain provisions of the Oklahoma Constitution and certain Oklahoma statutory provisions. Counsel for petitioners never specified a constitutional right which had been violated either in the trial court or in the State Supreme Court. Their Petition in Error (T.R. 1) which assigns eleven grounds for reversal does not point to or suggest a single Federal right which has been violated. None of their briefs or oral argument in the Supreme Court of Oklahoma complained that they were being denied any Federal Constitutional rights or that they claimed under any Federal Constitutional provi-

sion prior to the time the Supreme Court of Oklahoma promulgated its opinion.

They do not now point to any act or ruling which deprives them of property without due process of law or without just compensation. In the condemnation case they admit that they had the notice provided by law; that they were in no sense deprived of a right to be heard and that the value of the entire estate in their hands was first fixed by a board of commissioners and later by a jury. They do say that they believed the land was being taken for a park, when, in fact, it was being taken principally for an airport, and that this misbelief influenced their acceptance of the judgment of the trial court in the condemnation action. But even if petitioners and their counsel could have misunderstood the exact purposes for which the land was to be used by the City, it is extremely difficult to understand why it should have brought more money to them for one purpose rather than the other.

Mere assertion of title to real estate under a clause of the Constitution of the United States, or mere assertion that one has been deprived of his title in violation of a clause of the Constitution is not sufficient to give the Supreme Court jurisdiction unless there be at least a plausible foundation for such claim. *Iowa v. Rood*, 187 U. S. 87, 47 L. Ed. 86. The claim must be real and substantial. This is also true as to a claim that a judgment in condemnation denied the complaining party due process of law under the Fifth Amendment. *Consolidated Turnpike Co. v. Norfolk & O. V. Railway Co.*, 228 U. S. 596, 57 L. Ed. 982. In *United States v.*

2.4 Acres of Land Etc., 138 Fed. (2d) 295, the ninth paragraph of the syllabus is as follows:

“With respect to property owner’s rights under constitutional provision prohibiting taking of private property without compensation or without due process of law, the law of the state as declared by its Supreme Court is controlling as a rule of property.”

The foregoing case quotes with approval on this point from *Kaukauna Water-Power Co. et al. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 35 L. Ed. 1004.

Counsel for petitioners make repeated assertions that petitioners’ property was condemned for a private purpose and was later leased to various persons who desired to use the land as a landing field for aircraft. The witness, F. G. Baker, City Auditor, testified in the trial of this case (T.R. 86-87) the manner of operating Will Rogers Field which was the principal Municipal Airport which had been turned to the army to aid in the war effort. The method described by this witness is the usual method of operating a municipal airport. He further testified (T.R. 93) that Municipal Airport No. 2, according to his understanding, would be operated in the same manner as Will Rogers Field had been operated. The great weight of authority, including the Supreme Court of Oklahoma, holds that the operation of an airport by municipality is a public and not private purpose. *Dysart v. City of St. Louis*, 321 Mo. 514, 11 S. W. (2d) 1045; *City of Wichita v. Klapp*, 125 Kan. 100, 263 Pac. 12; *Heese v. Rath*, 249 N. Y. 436, 164 N. E. 342; *McClintock v. City of Rosebury*, 127 Ore. 698, 273 Pac. 331; *Wentz v. City of Philadelphia*,

301 Pac. 261, 151 Atl. 883; *Krenwinkle v. City of Los Angeles*, 4 Cal. (2d) 611, 51 Pac. (2d) 1098; *Goswick v. City of Durham*, 211 N. C. 687, 191 S. E. 728; *Erickson v. King*, (Minn.), 15 N. W. (2d) 201; *Swoger v. Glenn County*, 179 Ga. 768, 177 S. E. 723; *State v. Monroe County*, 148 Fla. 111, 3 So. (2d) 754; *Kenton County, Fiscal Court v. Richards*, 291 Ky. 132, 163 S. W. (2d) 302; *Ruth v. Oklahoma City*, 143 Okla. 62, 287 Pac. 406.

In spite of the foregoing, counsel for petitioners still contend that a municipal airport operated in the usual course serves only private purposes, is not a public purpose and that this reason, unknown to petitioners at the trial of the condemnation case, in some strange way deprived them of their property without due process of law or without just compensation or both. In addition to the foregoing, several courts have held that a municipal airport was not only a public purpose but that it is a public utility. *Pierce v. Storms*, 191 Okla. 410, 130 Pac. (2d) 523; *State ex rel. Hile v. City of Cleveland*, 26 Ohio App. 265, 160 N. E. 241; *State ex rel. City of Lincoln v. Johnson*, 117 Neb. 301, 220 N. W. 273.

Proposition No. II

No Federal question was presented to the State Court as required by the applicable statutes, rules and decisions.

As we understand the rule laid down by numerous decisions of this Honorable Court, the court will not undertake a review by certiorari of a state court decision unless the aggrieved party has, prior to decision in the state court,

presented the Federal question relied upon and given that court an opportunity to pass upon it. *Puget Sound Power etc. Co. v. King County*, 264 U. S. 22, 68 L. Ed. 541; *Hulbert v. Chicago*, 202 U. S. 275, 50 L. Ed. 1026; *Louisville etc. R. Co. v. Woodford*, 234 U. S. 46, 58 L. Ed. 1202; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591; *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U. S. 206, 82 L. Ed. 751. No Federal question or claim of right under any Federal Constitutional provision, real or imaginary, was ever presented to the Supreme Court of Oklahoma prior to its decision in the case.

It is true that a general reference to the deprivation of a right guaranteed by the Constitution of the United States is contained in the amended petition in the trial court in words as follows:

“ * * * and that the City of Oklahoma City, Oklahoma, is trying to deprive these plaintiffs of their right to the above-described property in violation of their rights under the constitution of the United States” (T.R. 11).

The foregoing in the absence of an allegation of fact and a reference to the Constitutional provision is too general and is insufficient. No reference thereafter was ever made to the deprivation of a Federal Constitutional right, or that any Federal Constitutional guaranty was being relied upon for relief prior to the court's decision. It was not suggested among their assignments of error in the petition in error (T.R. 1). No Federal question was ever mentioned in any of the printed briefs or oral arguments to the Oklahoma Supreme Court.

After the promulgation of the opinion of the Oklahoma Supreme Court, petitioners filed a petition for rehearing and a brief in support thereof, which brief does not appear in the transcript of record in this proceeding. In that brief was contained a general reference to the court's ruling as being a violation of their rights under the Fourteenth Amendment to the United States Constitution. This, however, if otherwise sufficient, comes too late. *Herndon v. State of Georgia*, 29 U. S. 441, 55 Sup. Ct. 794; *Southwestern Bell Telephone Co. v. State of Oklahoma*, *supra*.

Proposition No. III

The suit, as to legal questions, involved only construction of certain provisions of the Oklahoma Constitution and Oklahoma Statutes, and Federal courts are bound by the construction of local statutory and constitutional provisions placed thereon by the State Court of last resort.

It has been petitioners' contention, and still is, that the City of Oklahoma City, in the acquisition and operation of a municipal airport, was a common carrier; that an airport was a right of way; and that a fee simple title to lands for such purpose could not be taken without the consent of the owner without offending Section 24, Article 2 of the Constitution of Oklahoma. They also contended that the acquisition of land for a municipal airport to serve the flying public amounts to acquiring the land for a private purpose in violation of Section 23, Article 2, of the Oklahoma Constitution, which prohibits taking private property for a private purpose. They also contend that this violates Sec-

tion 17, Article 10 of the Constitution of Oklahoma, which forbids the lending of credit to any corporation, association or individual. They have further contended that Section 563, Title 11, O. S. 1941, does not authorize the City to acquire the fee simple title to lands for a municipal airport; and that the Supreme Court of Oklahoma has placed on such statute and Constitutional provisions erroneous constructions.

The Supreme Court of Oklahoma, by its opinion in this case, followed the local applicable statute and its former decisions to the effect that the act of carrying or of holding out as a carrier for the public was the test. Section 4, Title 13, O. S. 1941, defines common carrier as follows:

"Everyone who offers to the public to carry persons, property or messages, is a common carrier of whatever he thus offers to carry."

See *Travis v. Dickey*, 96 Okla. 256, 222 Pac. 527; also *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

The witness, H. E. Bailey, in the trial court, testified (T.R. 59), that the City, in operating its principal airport, did not own any aircraft of any kind; and did not hold itself out to the public that it was in the business of carrying either persons or property by air. The witness, F. G. Baker, testified (T.R. 94), that the City never owned any aircraft, never carried anything by air and did not hold itself out to the public as a carrier of persons, property or messages.

The Supreme Court of Oklahoma rejected petitioners' claim that the acquisition and operation of a municipal airport was a private purpose or that it offended either Sec. 23, Article 2, or Sec. 17, Article 10, of the Constitution of Oklahoma. We have cited a great number of cases, two of which come from Oklahoma, under our First Proposition, which sustain the State Court in this particular.

The opinion of the Supreme Court of Oklahoma holds that the Legislature of Oklahoma has power to enact laws which will enable a municipality to acquire a fee simple title in real estate by the exercise of the power of eminent domain and that Section 563, Title 11, O. S. 1941, does grant such authority. The Oklahoma Supreme Court had previously ruled likewise in the case of *Ramsey v. Leeper et al.*, 166 Okla. 43, 31 Pac. (2d) 852. This case involved a construction of the same section of the statute now being considered except that it was amended to include airports after the decision in *Ramsey v. Leeper*. See also *Horn v. State*, 184 Okla. 306, 87 Pac. (2d) 127, and *Jones v. Oklahoma City*, 192 Okla. 470, 137 Pac. (2d) 233.

Section 563, Title 11, O. S. 1941, relates back to Section 5, Title 27 and Section 53, Title 66 of the same statutes.

According to the decisions, the Supreme Court of the United States must accept as controlling a decision of a State court of last resort on questions of local law, which include local Constitutions and local statutes. *Erie R. Co. v. Thompson*, 304 U. S. 64, 82 L. Ed. 1188; *American Ry. Express Co. v. Commonwealth of Kentucky*, 273 U. S. 269, 71 L. Ed. 639; *Arizona Employers' Liability Cases*, 250 U. S. 400, 63

L. Ed. 1058; *Supreme Lodge etc. v. Mayer*, 265 U. S. 30, 63 L. Ed. 885; *Smith v. Jennings*, 206 U. S. 276, 51 L. Ed. 1061; *Georgia R. Co. etc. v. Decatur*, 262 U. S. 432, 67 L. Ed. 1065.

PETITIONERS' ASSIGNMENTS OF ERROR

We are aware that counsel for petitioners have in their brief presented matters which are not answered in this response and brief. It seems to us that these matters have no relation to jurisdictional questions, which should be the extent of a petition and brief in this character of proceeding under the rules.

Perhaps we are not justified under the rules in taking notice of these things. However, it is doubtful that a charge of fraud and subterfuge against a unit of government should ever be ignored on any occasion, irrespective of the fact that the record disproves the charge. These charges are directed at the purpose recited in the condemnation case for the taking of the land. It is the contention of respondent that the purpose, to-wit: "for public park, with the privilege of locating an aviation airport thereon" was truly descriptive of the plan for acquisition, development and operation, and was not a subterfuge nor a fraud upon anyone. The witness, F. G. Baker, testified (T.R. 75-78), that of the original cost of all the land in Section 8, which constituted Municipal Airport No. 2, \$67,670.45 was paid from a Park Department Account and appropriation and the balance of \$31,955.55 was paid from the Airport Bond Fund. At page 51 of the Transcript of Record and again at page 59, the wit-

ness, H. E. Bailey, described the park and recreational features which had been approved by the City Council for this airport. He stated (T.R. 59) that the airport was planned principally after the Washington National Airport at Washington, D. C. Again the architect, Thomas L. Sorey, as a witness (T.R. 131-132), described the park and recreational features of the airport, which he drew at the direction of the City Council. The relation between airports and parks are discussed at length in *Schmoldt v. City of Oklahoma City*, 144 Okla. 258, 291 Pac. 119; and *Ruth v. Oklahoma City*, *supra*.

The trial court found that there was no concealment, fraud or subterfuge, and the Supreme Court of Oklahoma likewise held that the charge was without merit (See Opinion, commencing at bottom of page 218, Transcript of Record).

Again counsel for petitioners argue that the Supreme Court of Oklahoma denied them some sort of right when the Court's mandate was ordered issued to the trial court on the same day the petition for rehearing was overruled. Rule 33 of the State Court provides that the aggrieved party shall have five days after the petition for rehearing is denied to file a petition for leave to file a second petition for rehearing, and that the mandate shall not issue until the party has had this right. Whether this was done prematurely by the State Court inadvertently or intentionally, the Fischers could not have been prejudiced. The State Court permitted the filing of a motion to recall mandate (T.R. 227), which was later overruled (T.R. 229). The Court

permitted the filing of application for leave to file second petition for rehearing, which application was then denied (T.R. 240).

We respectfully submit that the petition for writ of certiorari to the Supreme Court of Oklahoma should be denied.

A. L. JEFFREY,
309 Municipal Building,
Oklahoma City, Oklahoma,
Counsel for Respondent.

ARTHUR LEACH,
309 Municipal Building,
Oklahoma City, Oklahoma,
of Counsel.

April, 1947.